In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1031

WALTER KOCHER, a/k/a WALTER A. KOCHER, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The government brought this action for foreclosure of federal tax liens in the United States District Court for the Southern District of New York. The amount of petitioner's accrued tax liability, with interest, was determined to be in excess of $500,000, and petitioner does not contest that finding.[1] Upon the government's motion for partial summary judgment, the court ordered foreclosure on certain property held by petitioner and his wife as tenants in common (Pet. App. 16a-28a). The order permitted sale of the entire property, subject to payment of one-half the net proceeds to petitioner's wife, and also permitted the government as junior lienor to bid at the sale with no restriction on the amount it could offer. The court of appeals affirmed (Pet. App. 1a-13a).

---

[1]References to "petitioner" refer only to Walter Kocher. Petitioner Rose Kocher will be separately referred to as petitioner's wife.

1. Petitioner contends (Pet. 10-12) that Section 7403 of the Internal Revenue Code of 1954, 26 U.S.C. 7403, permits the government to enforce its lien only by selling petitioner's undivided half interest and not by selling the entire property subject to payment over of a share of the proceeds to his wife. But that Section expressly entitles the government "to subject any property, of whatever nature, of the delinquent [taxpayer], or in which he has any right, title, or interest, to the payment of [the unpaid] tax or liability." The court of appeals correctly held, in an opinion on which we rely (Pet. App. 4a-7a), that the statute permits a foreclosure sale of the entire property, notwithstanding any contrary provisions in state law relating to partition of tenancies in common.[2]

2. Petitioner's contention (Pet. 12-15) that the district court erred in permitting the government as junior lienor to bid at the foreclosure sale was answered by the court of appeals (Pet. App. 7a-10a), on whose opinion we primarily rely. We further note that the district court was authorized generally to set such terms and conditions of sale as it deemed appropriate to avoid injustice. See 28 U.S.C. 2001.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

[2]As petitioner points out (Pet. 8-9), the decision below conflicts with *Folsom* v. *United States*, 306 F. 2d 361 (C.A. 5), which permitted a sale only of the taxpayer's undivided interest in a tenancy in common. We believe *Folsom* to be plainly wrong and at variance with the clear language of the statute. Furthermore, no court of appeals has followed *Folsom*, and just two years ago this Court denied certiorari in a case involving the same issue now raised by petitioner. See *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *United States* v. *Overman*, 424 F. 2d 1142 (C.A. 9); *United States* v. *Trilling*, 328 F. 2d 699 (C.A. 7).